Before the

FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of:	)	
	)	
Implementation of Pay Telephone	)	CC Docket No. 96-128
Reclassification and Compensation	)	
Provisions of the Telecommunications	)	
Act of 1996	)	

REPLY COMMENTS OF
CORRECTIONS CORPORATION OF AMERICA

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Corrections Corporation of America ("CCA"), by its attorneys, hereby replies to the comments on the Petition For Rulemaking or, in the Alternative, Petition to Address Referral Issues In a Pending Rulemaking (the "Petition"), filed by Martha Wright and others (the "Petitioners").[1] Review of the comments demonstrates that the Commission must not intervene and mandate specific structures and charges for the provision of inmate calling services. In support of the denial of the Petition, CCA states as follows:

I. Summary.

Numerous parties filed comments on the proposals advanced by the Petitioners in an effort to substitute their judgment for the judgment of states and local authorities with respect to the provision of, and the charges for, inmate calling services. The largest majority of commenters, like CCA, recognize that the Commission does not have the authority to mandate many of the structural and price mandates sought by the Petitioners, and should not exercise the

[1] These Reply Comments are being timely filed on April 21, 2004, pursuant to an Order released on March 24, 2004, DA 04-774, which extended the time for responding to comments on the Petition now being considered as an *ex parte* presentation in connection with the Commission's pending *Order on Remand and Notice of Proposed Rulemaking*, CC Docket No. 96-128, 17 FCC Rcd. 3248 (2002) ("*Inmate Payphone Proceeding")*.

authority it does have act in this venue.[2] As a review of these comments demonstrates, prison administrators, whether public or private, are not common carriers, and are owed great deference over all aspects of inmate calling services.[3] Furthermore, exercising their discretion, prison administrators reasonably may conclude that collect calling and single provider systems are necessary to achieve their penological objectives, and should not be forced to establish debit calling and multiple carrier environments.[4] Finally, the assessment of commission charges for telecommunications site access is a reasonable manner for prison authorities to be compensated for the use of their facilities and the expenses associated in providing inmate calling services. Site commissions traditionally have served and funded valid penological objectives; the levels of such commissions and charges for inmate calling services are regulated by the states to ensure that the benefits of less costly inmate calling services are balanced by the security and other rehabilitative and penological interests of the public.[5]

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[2] *See* Comments of The Ohio Department of Rehabilitation and Correction, March 26, 2004 ("Ohio DRC Comments"); New York State Department of Correctional Services Comments in Opposition To Petition For Rulemaking Filed Regarding Issues Related To Inmate Calling Services, filed March 9, 2004 ("New York State DOCS Comments"); Comments of Peter V. Macchi, Director of Administrative Services, Massachusetts Department of Correction, filed February 11, 2004 ("Massachusetts DOC Comments"); Comments of Roger Werholz, Secretary, Kansas Department of Corrections, filed February 4, 2004 ("Kansas DOC Comments"); Comments of Devon Brown, Commissioner, New Jersey Department of Corrections, filed February 6, 2004 ("New Jersey DOC Comments"); Comments of WorldCom, Inc., d/b/a MCI, filed March 10, 2004 ("MCI Comments"); RBOC Payphone Coalition's Comments On The Notice of Proposed Rulemaking Regarding Inmate Calling Services, filed March 10, 2004 ("RBOC Payphone Coalition Comments"); Comments of T-NETIX, Inc., filed March 10, 2004 ("T-NETIX Comments"); Comments of AT&T Corp. In Opposition To The Wright Petition For Rulemaking Regarding Issues Related To Inmate Calling Services, filed March 10, 2004 ("AT&T Comments"); Initial Comments of Evercom Systems, Inc., filed March 10, 2004 ("Evercom Comments"); Comments of the Association Of Private Correctional And Treatment Organizations, filed March 10, 2004 ("APCTO Comments").

[3] *See, e.g.,* CCA Comments at 6-15; New York State DOCS Comments at 6-7; APTCO Comments at 4-10; MCI Comments at 9-17, 30; RBOC Payphone Coalition Comments at 6-9; T-NETIX Comments at 6-14.

[4] *See, e.g.,* CCA Comments at 16-31; Ohio DRC Comments at 2-4; New York DOCS Comments at 7-15; Massachusetts DOC Comments at 1; Kansas DOC Comments at 2; New Jersey DOC Comments at 2-3; MCI Comments at 18-29; Evercom Comments at 4-6.

[5] *See, e.g.,* CCA Comments at 34-37; MCI Comments at 30-33; Massachusetts DOC Comments at 1; New Jersey DOC Comments at 1-2; New York State DOCS Comments at 5-6.

While every State department of correction, inmate calling service provider and private manager of correctional facilities filing comments have opposed the Petitioners' requests, several commenters, who are not involved in the operation of corrections facilities and telephone services, generally supported the goals of the Petitioners.[6] The ACLU, CURE, NASUCA and the Ad Hoc Coalition generally stress the importance of inmate calling capability in the effort to rehabilitate inmates, and encourage the FCC to compel correctional facility managers to offer pre-paid debit telecommunications offerings and to require competition in the provision of inmate calling services.[7] These commenters also request that the FCC prohibit the payment of commissions to correctional facilities, and find that inmate telephone rates are not just and reasonable.[8]

In these reply comments, CCA demonstrates that the Commission must heed the limits of its authority and expertise, and leave to the states and correctional facilities appropriate judgments about the level of security required for the operation of their prison systems. Privately managed correctional facilities are not carriers regulated by the FCC, and cannot and should not be compelled to establish pre-paid telecommunications service accounts or specific inmate calling service platforms or architectures. Moreover, as the comments of all parties make clear, there is no distinction that can be legitimately maintained between private and public administrators of correctional facilities. The FCC must recognize, as it has for many years, the limits of its jurisdiction and expertise, and leave the states to establish the appropriate balance

[6] Comments of the Ad Hoc Coalition For The Right To Communicate Regarding Petition For Rulemaking Or, In The Alternative, Petition To Address Referral Issues IN Pending Rulemaking, filed March 10, 2004 ("Ad Hoc Coalition Comments); Comments of the National Association Of State Utility Consumer Advocates, filed March 10, 2004 ("NASUCA Comments"); Comments of Citizens United For Rehabilitation Of Errants In Response To The Wright Petition For Rulemaking ("CURE Comments"); Comments of The American Civil Liberties Union And The Washington Lawyers' Committee For Civil Rights And Urban Affairs, filed March 10, 2004 ("ACLU Comments").

[7] *See, e.g.,* ACLU Comments at 4-5; CURE Comments at 7-9; Ad Hoc Coalition Comments at 13-39.

between security and cheaper access to the telephone network. Far from demonstrating any need for the requested Commission intervention into the structure and charges for inmate calling services, the record in this proceeding suggests that charges for inmate calling are not exorbitant and are appropriately addressed by the states. The states are reaching reasoned and appropriate conclusions regarding charges for inmate calling services, even if they fail to provide for the unrestricted and subsidized access sought by the Petitioners. As the comments demonstrate, commissions charged to inmate calling service providers by private and public correctional facilities for access to those telephone services are established and reviewed by the states, and serve legitimate penological functions.

II. The Commission Cannot And Should Not Adopt Rules Targeted At Privately Administered Prisons and Correctional Facilities.

As a review of the comments from all the parties makes clear, the record does not support any distinction for inmate calling service rules and procedures between privately managed and publicly managed correctional facilities. As even the ACLU and CURE indicate, even though the Petition addresses only inmate calling services in privately administered prison facilities, the Petitioners' arguments and their advocates support "the implementation of similar relief in all prisons."[9] As APTCO demonstrates, there is no legitimate basis for any distinction, and the establishment of such a distinction will make it impossible for privately administered prisons to comply with the same state laws that apply to publicly administered state correctional facilities.[10] APTCO also correctly states that the adoption of a policy that discriminates between privately and publicly administered prisons may force state correctional authorities to alter their

[8] *See, e.g.,* ACLU Comments at 6; CURE Comments at 9; NASUCA Comments at 7-17.

[9] ACLU Comments at 2 n.3; CURE Comments at 2 n.3.

[10] APTCO Comments at 4-5.

efficient allocation of resources between public and private correctional facilities. As APTCO shows, the inequitable impact of such rules -- potentially increasing costs, decreasing security measures and fraud prevention, and eliminating sources of cost recovery when private correctional facility managers are used -- could jeopardize the security of the public and further burden the already overcrowded and financially strained public prison systems in many states.[11]

The Comments of the Ohio DRC most clearly illustrate the harm that can be caused by the FCC's adoption of different regulatory regimes for privately and publicly administered prisons. First, as the Ohio DRC notes, one of the three facilities addressed in the Petition is the Northeast Ohio Correction Center ("NOCC") in Youngstown, Ohio.[12] The Ohio DRC states that "the operation of NOCC is regulated and governed by Section 9.07 of the Ohio Revised Code" and the relief requested by the Petition "could possibly conflict with that state law."[13] Thus, according to the Ohio DRC, the FCC's adoption of the Petitioners' proposals would violate the laws of one of the states in which one of the very limited number of facilities studied by the Petitioners and their consultants is maintained.

Second, the Ohio DRC indicates that the proposal would conflict with other laws of the State of Ohio, or prove meaningless to the extent that states sought to reserve the rights addressed by the FCC. Section 9.06 of the Ohio Revised Code authorizes the Ohio DRC and counties and municipal corporations "to contract for the private operation and management of a correctional facility."[14] Section 9.06 contains "numerous criteria governing the contract and the operation and management of the facility," including the provision of inmate telephone service at

[11] APTCO Comments at 5-6. *See also* CCA Comments at 6-8.

[12] Ohio DRC Comments at 7.

[13] Ohio DRC Comments at 7.

its two private prison facilities.[15] The Ohio DRC notes that "the scope of the Wright Petition clearly intends to include these two facilities," but that under Section 9.06(C)(7) of the Ohio Revised Code, which governs and regulates the administration of those facilities, the non-delegable duty of "contracting for local and long distance telephone services for inmates or receiving commissions from such services at those facilities" is retained by the state.[16] Consequently, the Ohio DRC maintains that "the scope of the Wright Petition is irreconcilable with that state law."[17] To the extent that a state could avoid the impact of the proposals of the Petitioners by reserving non-delegable rights over the regulated services, the FCC's adoption of the Petitioners' proposal would only establish a cumbersome and inefficient structure for exalting form over substance.

Finally, the Ohio DRC asserts that any FCC attempt to discriminate between private and public administration of correctional facilities would be an improper interference with its jurisdiction. As the Ohio DRC recognizes, it is authorized under Ohio law to enter into contracts for the provision of inmate telephone service which designate the Ohio DRC as the instrument of the State with regard to inmate telephone service: the Ohio DRC's "decision to rely on a single provider of inmate calling services is therefore an exercise of its sovereign authority in the context of correctional facilities. There is no authority to interfere or preempt this decision."[18] For all of the reasons cited in the comments, the FCC cannot and should not discriminate between publicly and privately administered correctional facilities.

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[14] Ohio DRC Comments at 7.

[15] Ohio DRC Comments at 7.

[16] Ohio DRC Comments at 7.

[17] Ohio DRC Comments at 7.

[18] Ohio DRC Comments at 7.

As the record in this proceeding now also reflects, there are even more fundamental restrictions on the FCC's jurisdiction to adopt regulations discriminating between, or even compelling action by, private and public managers of prisons or other inmate correctional facilities. As CCA indicated in its Comments, the Commission and the courts have recognized that prison administrators, whether public or private like CCA, are not "common carriers" subject to the requirements of the Communications Act of 1934 as amended by the Telecommunications Act of 1996 (the "Act").[19] Instead, CCA and other prison administrators arrange for the provision of inmate calling services by contract. In its Comments, MCI therefore has demonstrated that a prison administrator is neither an inmate calling service provider or an "interstate telecommunications carrier," and that the Act, including Section 251, cannot be used to mandate the changes sought by the Petitioners.[20] The RBOC Payphone Coalition similarly demonstrates that "prison administrators are not common carriers," making Section 201 inapplicable to their practices.[21] In these circumstances, the RBOC Payphone Coalition correctly maintains that no specific section of the Act, including the Act's grant of ancillary jurisdiction to the FCC, would support the Commission's adoption of the mandates sought by the Petitioners.[22] As the RBOC Payphone Coalition recognizes, the Commission, throughout its evaluation of potential rules governing access to multiple tenant facilities in the *Competitive Networks Proceeding*, acknowledged that it cannot compel specific types, or even mandate access, to facilities not owned and operated by regulated carriers.[23]

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[19] CCA Comments at 7 & n.3; *see Bowers v. T-NETIX and Verizon Phone Service and PA Dep't of Corrections*, 837 A.2d 608, 612 (PA 2003).

[20] MCI Comments at 11-12, 31.

[21] RBOC Payphone Coalition Comments at 7.

[22] RBOC Payphone Coalition Comments at 7-8.

[23] RBOC Payphone Coalition Comments at 9; CCA Comments at 25-26.

III. The Commission Must Not Attempt To Substitute Its Judgment For The Expertise of States and Departments Of Correction.

A. The FCC is Not the Forum For Prison Reform.

Regardless of whether the correctional facilities manager is a private corporation or a sovereign public authority, the provision of inmate calling services ultimately is the responsibility of state legislatures, the departments of corrections and state and local law enforcement officials. CURE, the Ad Hoc Coalition and the ACLU provide extensive broad and general testimonials regarding the importance of inmate calling services to the rehabilitation of those individuals incarcerated in correctional facilities.[24] In the past, the Commission has recognized that state interests in security and law enforcement in the operation of inmate calling services must be balanced with the desire for lower-cost inmate calling services, and this proceeding is replete with reiterated citation and new expression of these concerns. CCA no doubt could spend additional time and effort to once again document these concerns.[25] As the Commission must recognize, however, the FCC is not the forum for the assessment of these legitimate state interests, much less the forum to evaluate the various factors that state departments of correction and legislatures must balance in establishing the environment to house and rehabilitate inmates. The Commission must leave to these legislatures, or the Congress, the effort for broad prison reforms sought by the ACLU, the Ad Hoc Coalition and CURE in supporting the far-reaching proposals of the Petitioners.

Other commenters recognize the appropriate limitations on the rulemaking that can be undertaken by the Commission. The RBOC Payphone Coalition, for example, explains

[24] *See* ACLU Comments at 4-5; CURE Comments at 7-9; Ad Hoc Coalition Comments at 13-39.

[25] *See* CCA Comments at 9-31; Ohio DRC Comments at 2-4; New York DOCS Comments at 7-15; Massachusetts DOC Comments at 1; Kansas DOC Comments at 2; New Jersey DOC Comments at 2-3; MCI Comments at 18-29.

that "state officials rely on a competitive bidding process to choose inmate calling service providers, and the criteria that such officials rely on in selecting such providers is likewise a matter beyond the appropriate domain of Commission action."[26] AT&T also points out that "private facilities are subject to the penological interests and regulations mandated by the states," and uses the example of CCA's facility in Oklahoma, where the Oklahoma legislature has mandated that private prison contractors obtain approval of the "internal security" of their facility from the Oklahoma Department Of Corrections, and that the Department Of Corrections monitor the "communications services" offered by prisons, including private prisons.[27]

B. Correctional Facilities Are Not Part Of The Free Market.

Nevertheless, supporters of the Petitioners like CURE and the Ad Hoc Coalition encourage the Commission to promote competition as it has "in every other market." For example, CURE states that in "every other market, the Commission has promoted competition in telecommunications services because competition encourages innovation and new technologies, puts downward pressure on rates, and provides incentives to carriers to operate efficiently."[28] The contention, however, that the FCC should force competition into inmate calling services like every other market fails to recognize that prisons and other correctional facilities are not like every other market. CCA and others have demonstrated that competitive long distance providers may not be feasible and will not bring competitive benefits – only inefficiency, additional cost, and increased security risks.[29] For example, the Ohio DRC, supported by the Declaration of its Telecommunications Manager, maintains that an "exclusive agreement with a single provider

[26] RBOC Payphone Coalition Comments at 2.

[27] AT&T Comments at 10, citing 57 Okla. Stat. 563.3; DOC Policy, OP-030401 at IV.A..1.a(12).

[28] CURE Comments at 7.

[29] *See* CCA Comments at 16-31; MCI Comments at 20-29; Ohio DRC Comments at 2-4; New York State DOCS

assures consistent quality both in service provided and in security measures."[30] As noted by the Ohio DRC, the "company selected to provide a secure calling system has a contractual obligation to maintain the security of communications, backed up with severe penalties for failing to do so. In contrast, the interconnecting carriers would not be contractually obligated to carry out any duties to provide the necessary security and technical requirements needed for an inmate calling services program."[31] The New York State DOCS provides similar testimony, indicating that the system that they have designed helped gather evidence to prosecute those responsible for the bombing of the World Trade Center in 1993; and security and monitoring systems producing such results are even more important after the events of September 11, 2001.[32] Other commenters have demonstrated that because of the emphasis on security, there is lively competition among bidders for inmate calling service contracts, and those competitors attempt to distinguish themselves based on quality of service, innovation, and reduced costs.[33]

C. The Judgment of States and Correctional Facilities Managers is Due Deference.

In these circumstances, the Commission simply cannot mandate that correctional facilities adopt debit calling options and the proposed multi-carrier environment, especially where it has refused to adopt in the *Competitive Networks Proceeding* less invasive rules requested by the commenters for multiple tenant entities subject to much less state and local concerns than prisons.[34] While CURE chastises the Commission for never questioning "the

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Comments at 7-15; T-NETIX Comments at 20-23.

[30] Ohio DRC Comments at 2.

[31] Ohio DRC Comments at 4.

[32] New York State DOCS Comments at 15.

[33] *See, e.g.,* Evercom Comments at 4; New York State DOCS Comments at 9-11.

[34] *See, e.g.,* CCA Comments at 25-26; RBOC Payphone Coalition Comments at 9.

assumption that such legitimate security functions are incompatible with competition or tried to determine whether they could satisfied when more than one carrier provided calling services in a prison," the Commission has repeatedly addressed this question, and determined that it should not substitute its judgment for the judgment of professional corrections managers regarding security concerns and the balance of rehabilitative interests.[35] While respectful of the Commission's jurisdiction and expertise with respect to interexchange telecommunications services, commenters note that the suggestion that the FCC would be able to evaluate the competing claims regarding security and costs, and determine the appropriate balance, is poorly considered. As the New York State DOCS indicates, the Commission "should recognize that operating an inmate telephone system requires penological expertise not associated with any other type of telephone service. The Commission should show appropriate deference to the determinations of prison administrators about how to satisfy both the desire to provide inmate telephone service and the need to implement appropriate security measures for such service."[36]

As an example, the Ad Hoc Coalition states that "the people incarcerated in private prisons tend to pose a relatively low security risk: in 2000, approximately 75% of private correctional facilities were low or minimum security facilities."[37] The FCC, however, is not in a position to evaluate how to treat security at low or minimum security facilities, much less the 25% of facilities that are of higher risk. Correctional facilities must account to the public for the risk posed by any inmate, and the Commission must not interfere with the performance of that duty. As Evercom's expert, Robert L. Rae, declares, because of cost concerns, Evercom "is only able to provide full security features to facilities of 50 beds or more" but increases in inmate

[35] *See, e.g.,* CCA Comments at 5-11; APTCO Comments at 6-9.

[36] New York State DOCS Comments at 7.

calling service platform and support costs "engendered by the proposed multiple carrier system will change the current cost model and *assure that even some of the larger facilities that Evercom serves today will not have the full suite of security features, thereby potentially heightening security concerns for the facility and community.*"[38] The FCC should, as it has in the past, recognize that it is the responsibility of the state departments of correction to balance these claims and provide for the appropriate balance of security and rehabilitation of inmates.

Even if it seeks to reach its own conclusions, the Commission must recognize that the proposal offered by Dawson, the Petitioners' consultant, is unfeasible and unrealistic. In its initial Comments in this proceeding, CCA submitted the Joint Declaration of Peter K. Bohacek and Charles J. Kickler, Jr., to support this proposition. Other commenters provided similar testimony.[39] As the New York State DOCS maintains, "the Petitioners and their expert ignore the realities of data sharing and personal responsibility."[40] The New York State DOCS notes that on countless occasions it "has needed to turn to MCI to obtain the information that was not readily apparent in the normal, day-to-day data sharing that occurs under the contract. This was only possible due to the single provider relationship."[41] Where the New York State DOCS has indicated that inmate calling in its facilities has been used "in the commission of a number of crimes" including "to arrange drug deals outside of prison, to coordinate the smuggling of drugs into prison, to arrange for murders and to intimidate witnesses," the Commission is wise to heed

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[37] Ad Hoc Coalition at 5.

[38] Evercom Comments, Rae Affidavit, ¶¶ 23-24 (*emphasis added*). Rae also indicates that "since more than 1/3 of Evercom's facilities today are in the partial security feature category, the increased costs would probably move them into the category of 'unable to serve'." Rae Affidavit, ¶ 24.

[39] *See, e.g.,* T-NETIX Comments, Affidavit of Robert L. Rae.

[40] New York State DOCS Comments at 13.

[41] New York State DOCS Comments at 14. The New York State DOCS states that it often relies upon information provided by MCI to determine the termination point of a telephone call when security issues require. *Id*.

the judgment of state law enforcement and correctional authorities by rejecting the level of security proffered by the Petitioners' telephony architecture and service rules.[42]

IV. The Commission Must Not Establish Restrictions On Charges For Inmate Calling Services Based On General Assertions About The Cost Of Inmate Calling And The Underlying Causes Of Those Costs.

The ACLU, CURE, the Ad Hoc Coalition and NASUCA argue that inmate calling service charges are excessive, based not only on the absence of competition and debit card offerings, but also on the assessment of commissions to inmate calling service providers. According to these commenters, commissions unnecessarily inflate the costs of inmate calls and result in a windfall of "profits" to correctional facilities.[43] NASUCA contends that the presence of commissions has led to "ratemaking chaos," where a number of states have attempted to establish different limitations on the assessment of site commissions and the use of the funds paid to correctional authorities as site commissions.[44] Given the different approaches of the states, NASUCA argues that the FCC must "use its authority to establish just and reasonable rates" for inmate calling service.[45]

A. Inmate Calling Charges Have Not Been Shown To Be Excessive.

As an initial matter, comments filed by various inmate calling service providers demonstrate that the Petitioners have not shown that rates charged for inmate calling services are

[42] For its part, carriers like T-Netix also supply reports that challenge the viability and security of the Petitioners' plan. T-NETIX, for example, challenges the Petitioners' assumption of an average of 1,743 inmates per facility. The Bureau of Justice Statistics states that 85% of prisons have fewer than 1,500 inmates, and more than 60% have fewer than 750 inmates. "By grossly overestimating prison size, Dawson has created a model in which carriers can sell enough call volume to recoup their costs quickly. In the bulk of prisons, and certain the county facilities that T-NETIX largely serves, this type of recoupment is not possible." T-NETIX Comments at 28-29.

[43] *See* NASUCA Comments at 6-7; CURE Comments at 3; Ad Hoc Coalition Comments at 13; ACLU Comments at 3.

[44] NASUCA Comments at 8.

[45] NASUCA Comments at 13.

excessive. For example, Evercom states that "in many jurisdictions where Evercom operates, the cost to an inmate of placing a collect call using Evercom does not vary widely from the cost of a collect call made from a public payphone in the visitor's center of the facility or on the street corner down the block."[46] Evercom maintains that "its rates are typically set no higher than dominant carrier rates for the same services" and that in many states, "intrastate rates are capped by state regulators."[47]

As another example, the New York State DOCS demonstrates that in New York, the telephone rates for its new inmate calling service contract have been limited to those of the tariff in effect. Thus, "responsive bidders were not permitted to increase the rates in order to offer a lower percentage but higher dollar value commission."[48] Although the commissions paid by the provider to DOCS have changed with each new contract term, the New York State DOCS demonstrates that the last time inmate calling service calling rates were changed was in 1994.[49] The New York State DOCS also challenges the general contention that inmate calling service charges should reflect competitive rates on a per minute basis:

> There are those who surmise that the cost of those inmate telephone calls should be approximate to what New Yorkers pay when they pick up their telephones at home and dial a call. But that residential customer is paying in the neighborhood of $30 a month to the phone company for the privilege of having a phone, before even one call is made. Those basic charges include federal, state and local taxes and excise surcharge, line and equipment fees plus other costs. For 66,909 inmates [in the New York State corrections system], those $30 per month charges would total $24 million annually – but inmates do not pay a penny in monthly charges to have phone service available to them.[50]

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[46] Evercom Comments at 9.

[47] Evercom Comments at 9.

[48] New York State DOCS Comments, Affidavit of Robert Koberger, ¶ 30.

[49] New York State DOCS Comments, Affidavit of Robert Koberger, ¶ 30.

[50] "*Inmate Pay Phone Access Fosters Family Ties, Enhances Security For All,*" New York State Department of Correctional Services, August 2003, at 1.

The comments filed in response to the Petition therefore demonstrate that charges for inmate calling services are not excessive, but are established in large part to recoup the cost of making inmate calling service locations, facilities and personnel available, and keeping them secure and maintained to the benefit of both the public and the inmates.

B. Site Commissions And Charges Are Best Managed By State Authorities.

Commissions charged to telecommunications service providers to recoup the costs of providing inmate calling facilities and other services thus have not been shown to be inappropriate, and are best managed by the state authorities and legislatures. As MCI demonstrates, court precedent allows states to exercise their powers to serve valid penological objectives; the objectives can be very broad, and include "not only the installation and maintenance of a secure calling system," but "the construction of correctional facilities" and programs that serve inmates.[51] As Evercom states, commissions also "go to fund activities directly beneficial to the inmates," for example, "GED programs, AIDS awareness, post-jail support and family outreach."[52] Commissions also are used permissibly to fund the operation of the confinement facility, including guards and security, particularly at smaller, local or municipal facilities.[53] The proper authority to review and regulate the abuse of commission charges would be state governmental entities such as the legislature or executive agency, including the public service commission, which could more appropriately balance the states' interest in funding inmate calling services and other related prison programs with the desire to maintain downward pressure on telephone rates charged to consumers.

[51] MCI Comments at 31.

[52] Evercom Comments at 8.

[53] Evercom Comments at 8-9.

In fact, NASUCA demonstrates in some detail that many states are adopting restrictions on commissions and charges for the provision of inmate calling services.[54] Like CCA in its initial comments, NASUCA illustrates that a number of jurisdictions are addressing concerns with the levels of correctional facility site commissions and inmate calling service charges. Nevertheless, despite NASUCA's claim that state initiatives to evaluate -- and in many cases regulate -- prison telephone rates have resulted in "ratemaking chaos," no such chaos or uncertainty exists. NASUCA cannot point to any contradictions or conflicts that "highlight the need for the FCC to adopt a consistent interstate policy to guide states in this matter."[55] Indeed, every prisoner is housed in only one prison at any given time, and the people receiving calls from that prisoner are informed of the charges that apply to each call as it is made. The FCC will not and cannot preempt state and local authority lightly, on the mere assertion that it would be nice to have a consistent policy, and cannot seriously consider such an action based on the record in this proceeding. Indeed, NASUCA's comments demonstrate the appropriateness of a "hands off" approach by the Commission where, as documented, a number of states and the District of Columbia have led state legislative initiatives in passing laws to prohibit the charging of exorbitant commissions by prison or correctional facilities and to restrict the use of inmate welfare funds to legitimate state interests.[56]

Moreover, individualized treatment of commissions and charges by the states is appropriate in the context of inmate calling services because the level of commissions and charges is highly dependent upon specific state decisions about the security, anti-fraud and law enforcement measures that must be instituted at specific correctional facilities, which decisions

[54] *See* NASUCA Comments at 9-13.

[55] *See* NASUCA Comments at 8, 10-11.

take into consideration the size and organization of those state correctional facilities. As CCA recognized in its initial comments, the FCC would encounter serious difficulty in attempting to establish a rational and workable "one-size-fits-all" regulatory regime for inmate calling services. The FCC also is ill-equipped to provide for rules and procedures that would not arbitrarily and inappropriately tread on state authority in evaluating necessary inmate security services and the costs that would be recoverable for such services.

C. Inmate Calling Services Do Not Invoke The Policies Underlying Universal Service.

NASUCA, CURE and the Ad Hoc Coalition may object to the policy of fully recovering the costs incurred in providing inmates with calling and other services, but the Commission is not the forum for establishing rehabilitative penal policy. For that reason, CURE's attempt to rely on Section 254 of the Act and the desire to promote universal service cannot justify the establishment of subsidies to promote inmate calling services. CURE notes that "those trying to maintain ties to inmates are often economically disadvantaged," and attempts to support its plea for FCC-mandated lower inmate calling service charges with the contention that the Commission has implemented universal service support to ensure that rates for those in rural and underserved areas, "high-cost areas," are comparable to those in prisons.[57] The Commission's establishment of universal service supports are mandated by far more specific and traditional laws and policies than are invoked by CURE's concerns. The Commission's universal service rules do not require any service provider to offer service below cost, but provide funded subsidies for the provision of that service. At this time, despite years of

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[56] NASUCA Comments at 11.

[57] CURE Comments at 4. CURE states: "Users of inmate calling services are similarly disadvantaged because they do not have access to reasonably priced services; however, they are not afforded similar protection from excessive rates charged for ICS." *Id*. at n.6.

proceedings to establish subsidies for communications services for rural and high cost areas, schools and libraries, and rural health care providers, the Commission has yet to establish rules to provide for funds that would support the costs of offering inmate calling services. Indeed, to the extent site commissions are assessed, they fulfill thus purpose.

In conclusion, the Commission cannot find that inmate calling service rates are not "just and reasonable" on the basis of the record in this rule making proceeding. Neither the Petitioners nor their supporters have demonstrated that the FCC should change its prior determinations regarding inmate calling services, and the comments filed by inmate calling service providers and state corrections officials have uniformly explained why the rates charged to prisoners are, in fact, "just and reasonable." In supporting "reasonable inmate payphone rates," for example, APTCO has explained that a "reasonable inmate payphone rate" is not the same as a reasonable rate "for a telephone service that does not require all the security features or have the additional costs" required in a prison.[58] The Commission's long standing policy permitting exclusive service providers and deference to corrections authorities in matters of telephone security, rates, and features, is based on an extensive record, compiled over several years, in proceedings covering a range of different rules. By contrast, the Petitioners' proposal is based on theoretical assumptions expansively applied to many disparate settings, based on minimal data, and supported only by the most general of one-sided policy desires from those who represent inmates and the people regrettably affected by the need for an individual's incarceration.

[58] APTCO Comments at 16.

V. Conclusion.

For the reasons provided in its Comments and these Reply Comments, Corrections Corporation of America opposes the proposals of the Petitioners.

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